

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

LORETTA WILLIAMS, INDIVIDUALLY ) C-22-03780 WHO  
AND ON BEHALF OF ALL OTHERS )  
SIMILARLY SITUATED, ) SAN FRANCISCO, CALIFORNIA  
)  
PLAINTIFFS, ) DECEMBER 14, 2022  
)  
VS. ) PAGES 1-47  
)  
WHAT IF HOLDINGS, LLC D/B/A C4R )  
MEDIA CORP., AND )  
ACTIVEPROSPECT, INC., )  
)  
DEFENDANTS. )  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WILLIAM H. ORRICK  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: WOODROW & PELUSO, LLC  
BY: PATRICK H. PELUSO  
3900 EAST MEXICO AVENUE, SUITE 300  
DENVER, COLORADO 80210

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES (CONTINUED)

FOR DEFENDANT SHEPPARD MULLIN RICHTER & HAMPTON LLP  
WHAT IF: BY: JAY T. RAMSEY  
1910 AVENUE OF THE STARS, SUITE 1600  
LOS ANGELES, CALIFORNIA 90067

FOR DEFENDANT KELLEY DRYE & WARREN LLP  
ACTIVEPROSPECT: BY: LAURI A. MAZZUCHETTI  
ONE JEFFERSON ROAD, 2ND FLOOR  
PARSIPPANY, NEW JERSEY 07054

BY: BECCA J. WAHLQUIST  
350 SOUTH GRAND AVENUE, SUITE 3800  
LOS ANGELES, CALIFORNIA 90071

1 SAN FRANCISCO, CALIFORNIA

DECEMBER 14, 2022

2 P R O C E E D I N G S

3 (COURT CONVENED AT 11:03 A.M.)

4 THE COURT: GOOD MORNING. EVERYONE BE SEATED,  
5 PLEASE.

6 OKAY. LET'S CALL THE CASE.

7 THE CLERK: CALLING CIVIL ACTION 22-3780, WILLIAMS  
8 VERSUS WHAT IF HOLDINGS LLC, ET ALL.

9 COUNSEL, PLEASE APPROACH THE PODIUM AND STATE YOUR  
10 APPEARANCES FOR THE RECORD, BEGINNING WITH COUNSEL FOR  
11 PLAINTIFF.

12 MR. PELUSO: GOOD MORNING, YOUR HONOR.

13 PATRICK PELUSO APPEARING ON BEHALF OF PLAINTIFF AND THE  
14 ALLEGED CLASS.

15 THE COURT: THANK YOU.

16 MS. MAZZUCHETTI: GOOD MORNING, YOUR HONOR.

17 LAURI MAZZUCHETTI FOR DEFENDANT, ACTIVEPROSPECT.

18 THE COURT: LAURI, SAY IT AGAIN.

19 MS. MAZZUCHETTI: MAZZUCHETTI.

20 THE COURT: OKAY. THANK YOU.

21 AND?

22 MR. RAMSEY: AND GOOD MORNING, YOUR HONOR.

23 JAY RAMSEY ON BEHALF OF WHAT IF HOLDINGS.

24 THE COURT: THANK YOU.

25 WHO IS THAT?

1 MS. MAZZUCHETTI: MY COLLEAGUE, MY CALIFORNIA-BASED  
2 COLLEAGUE, BECCA WAHLQUIST, IS PRESENT AS WELL.

3 THE COURT: THANK YOU.

4 OKAY. THIS IS A MOTION BY YOUR SIDE.

5 MS. MAZZUCHETTI: YES, YOUR HONOR.

6 THERE ARE TWO MOTIONS, A MOTION TO COMPEL ARBITRATION AND  
7 A MOTION TO DISMISS.

8 THE COURT: LET'S DEAL WITH THE MOTION TO DISMISS  
9 FIRST.

10 MS. MAZZUCHETTI: SURE, YOUR HONOR.

11 MAY I PROCEED WITHOUT A MASK?

12 THE COURT: YEAH. TAKE IT OFF SO I CAN HEAR YOU  
13 BETTER.

14 MS. MAZZUCHETTI: THANK YOU, YOUR HONOR.

15 IN THE COMPLAINT, PLAINTIFF HAS ASSERTED THREE CAUSES OF  
16 ACTION: ONE UNDER SECTION 631 OF THE CALIFORNIA INVASION OF  
17 PRIVACY ACT; THE SECOND CAUSE OF ACTION IS A UCL CLAIM; AND THE  
18 THIRD IS A CALIFORNIA INVASION OF PRIVACY ACT CLAIM.

19 PLAINTIFF HAS CONCEDED THE UCL CLAIM AND, THEREFORE, A  
20 DISMISSAL ON THAT COUNT IS APPROPRIATE.

21 WITH RESPECT TO THE 631 CLAIM UNDER CIPA, THAT IS A CLAIM  
22 OF WIRETAPPING.

23 THIS CASE INVOLVES A TECHNOLOGY, A SOFTWARE SERVICE  
24 OFFERED BY MY CLIENT, ACTIVEPROSPECT, THAT THIRD PARTY WEBSITE  
25 OWNERS UTILIZE ON THEIR WEBSITES FOR PURPOSES OF CAPTURING AND

1 DOCUMENTING RECORDS PERTAINING TO CONSENT USED FOR COMPLIANCE  
2 WITH THE TELEPHONE CONSUMER PROTECTION ACT.

3 ESSENTIALLY, WHEN A WEBSITE VISITOR IS COMMUNICATING WITH  
4 A WEBSITE AND PROVIDING INFORMATION, THE WEBSITE OWNER CAN RUN  
5 ACTIVEPROSPECT'S SCRIPT, PRODUCTS REFERRED TO AS TRUSTEDFORM,  
6 WHICH WILL CAPTURE ON THE WEBSITE OWNER'S SIDE MOUSE CLICKS AND  
7 MOVEMENTS AND KEYSTROKES.

8 THE COURT: BUT DOES IT -- OKAY. SO IT'S KEYSTROKES  
9 THAT IT CAPTURES; IS THAT RIGHT?

10 MS. MAZZUCHETTI: YES, YOUR HONOR, KEYSTROKES, IN  
11 ADDITION TO OTHER MOVEMENTS.

12 THE COURT: BUT WHAT OTHER MOVEMENTS?

13 MS. MAZZUCHETTI: MOUSE MOVEMENTS AND CLICKS.

14 THE COURT: HOW ABOUT WHAT -- DOES IT OVERHEAR AND  
15 RECORD WHAT PEOPLE ARE SAYING?

16 MS. MAZZUCHETTI: NO, IT DOES NOT, YOUR HONOR.

17 THE COURT: DOES IT TAKE PHOTOGRAPHS?

18 MS. MAZZUCHETTI: IT DOES NOT TAKE PHOTOGRAPHS, YOUR  
19 HONOR.

20 THE COURT: ALL RIGHT. SO WHAT IT DOES IS -- THE  
21 ONLY THING IT RECORDS ARE KEYSTROKES AND MOUSE MOVEMENTS?

22 MS. MAZZUCHETTI: YES, YOUR HONOR.

23 THE COURT: OKAY.

24 ALL RIGHT. PLEASE CONTINUE.

25 MS. MAZZUCHETTI: SURE.

1           THIS IS SOMETHING THAT, AS I INDICATED, WEBSITE OWNERS CAN  
2           UTILIZE ON THEIR WEBSITE. THEY DO IT FOR THEIR OWN COMPLIANCE  
3           PURPOSES. ESSENTIALLY IT'S JUST A TOOL, AND IN THIS DAY AND  
4           AGE, ALL WEBSITES OPERATE, MOST OPERATE USING A VARIETY OF  
5           THIRD PARTY TOOLS THAT ARE RUNNING ON WEBSITES THAT, YOU KNOW,  
6           SUPPORT THEIR FUNCTIONALITY AND THE WEBSITE OWNER'S ABILITY TO  
7           COLLECT INFORMATION.

8           HERE --

9           THE COURT: BUT WHAT -- WHAT INFORMATION WOULD BE  
10          TYPICALLY COLLECTED IN THIS CASE?

11          MS. MAZZUCHETTI: WELL, WITH RESPECT TO  
12          ACTIVEPROSPECT'S PRODUCT, THE INFORMATION THAT ACTIVEPROSPECT  
13          IS COLLECTING IS THIS IS THE WEB FORM AS IT APPEARED AS THE  
14          WEBSITE VISITOR VIEWED IT, AND THESE ARE THE INTERACTIONS THAT  
15          THE WEBSITE VISITOR HAD WITH THAT WEBSITE FORM.

16          THE COURT: BUT WHAT -- WHAT DOES THE FORM -- DOES  
17          THE FORM ASK FOR -- WHAT DOES IT ASK FOR?

18          MS. MAZZUCHETTI: IN THIS PARTICULAR INSTANCE, THE  
19          FORM WAS ASKING FOR INFORMATION, NAME, ADDRESS, PHONE NUMBER.

20          THE COURT: THAT'S IT?

21          MS. MAZZUCHETTI: YES.

22          THE COURT: NAME, ADDRESS, AND PHONE NUMBER? THAT'S  
23          IT?

24          MS. MAZZUCHETTI: YES, YOUR HONOR.

25          THE COURT: IS THERE A BOX WHERE THEY CHECK TO SAY,

1 "I AGREE TO THIS, I AGREE TO THAT"?

2 MS. MAZZUCHETTI: THERE IS A DISCLOSURE LANGUAGE, YOU  
3 KNOW, SIMILAR TO MANY WEBSITE FORMS THAT INDICATE THAT BY  
4 COMPLETING THE FORM AND HITTING SUBMIT, THAT THE WEBSITE  
5 VISITOR IS AGREEING TO THE WEBSITE OWNER'S TERMS OF USE AND  
6 PRIVACY POLICY. THAT IS FEATURED AT AN EARLIER STAGE OF THIS  
7 PARTICULAR WEBSITE FLOW, WHICH I'M SURE THE WEBSITE OWNER'S  
8 COUNSEL, C4R MEDIA, CAN ADDRESS.

9 BUT BY THE TIME THE USER GETS TO THE FORM IN QUESTION  
10 WHERE TRUSTEDFORM, MY CLIENT'S PRODUCT, WOULD BE RUNNING, THAT  
11 USER HAS ALREADY BEEN PRESENTED WITH THE TERMS OF USE AND THE  
12 PRIVACY POLICY.

13 WHAT'S MOST CRITICAL HERE, FOR A WIRETAP CLAIM, YOU KNOW,  
14 A WIRETAP INVOLVES AN UNAUTHORIZED CONNECTION TO EAVESDROP ON  
15 THIRD PARTY COMMUNICATIONS.

16 BUT WHAT'S A CRITICAL ELEMENT OF THAT IS INTERCEPTING THE  
17 COMMUNICATION WHILE IT'S IN TRANSIT.

18 ACTIVEPROSPECT'S PRODUCT DOES NOT DO THAT, AND PLAINTIFF  
19 DOES NOT ALLEGE THAT IT DOES.

20 THERE HAVE BEEN A COUPLE DECISIONS IN THE NORTHERN  
21 DISTRICT OF CALIFORNIA IN CASES BEFORE JUDGE BEELER, A CASE  
22 GRAHAM VERSUS NOOM, YALE VERSUS CLICKTALE, AND JOHNSON VERSUS  
23 BLUE NILE, THAT ALL INVOLVED SIMILAR TYPES OF PRODUCTS.

24 IN THOSE INSTANCES, IT WAS MORE OF A WEBSITE OPTIMIZATION  
25 TOOL LOOKING FOR HICCUPS AND BUGS. WHEN USERS ARE INTERACTING

1 WITH THE WEBSITE, IF SOMETHING IS GOING WRONG, THESE TOOLS WILL  
2 PICK THAT UP.

3 BUT IT'S VERY SIMILAR TO THE TYPE OF THIRD PARTY SOFTWARE  
4 TOOL THAT ACTIVEPROSPECT PROVIDES.

5 AND IN THOSE CASES, JUDGE BEELER DISMISSED AT THE PLEADING  
6 STAGE, FINDING IN EACH INSTANCE THAT MERELY USING A THIRD PARTY  
7 TOOL FOR A WEBSITE OWNER'S OWN PURPOSES IS NOT THE TYPE OF  
8 UNAUTHORIZED CONNECTION OR EAVESDROPPING THAT COULD SUPPORT A  
9 WIRETAP CLAIM.

10 THE COURT: HELP ME UNDERSTAND. THAT'S SOMETHING YOU  
11 KEEP SAYING, BUT I DON'T THINK -- I'M NOT SURE YOU REALLY MEAN  
12 FOR IT TO MAKE A DIFFERENCE.

13 YOU KEEP SAYING THAT IT'S A THIRD, THIRD PARTY WHAT, THIRD  
14 PARTY?

15 MS. MAZZUCHETTI: TOOL.

16 THE COURT: TOOL. ALL RIGHT. WELL, WHAT IF WHAT IF  
17 HAD COME UP WITH THIS TOOL ON ITS OWN AS OPPOSED TO PURCHASING  
18 IT FROM A THIRD PARTY, LIKE YOU? ARE YOU SAYING, SUGGESTING  
19 THAT IT WOULD BE WIRETAPPING?

20 MS. MAZZUCHETTI: NO, YOUR HONOR, IT WOULD NOT BE.

21 IN FACT, IF THERE WASN'T THE INVOLVEMENT OF A TOOL  
22 PROVIDED BY A THIRD PARTY, THERE COULDN'T BE ANY CLAIM AT ALL.  
23 I DON'T BELIEVE THAT PLAINTIFF WOULD EVEN TAKE THE POSITION  
24 THERE IS --

25 THE COURT: BUT WHAT DIFFERENCE DOES IT MAKE IF IT'S



1 A THIRD PARTY?

2 MS. MAZZUCHETTI: WELL, THAT'S WHERE THEY SAY THAT  
3 THE WIRETAP IS COMING IN, THAT BECAUSE THE WEBSITE OWNER IS  
4 USING THIS TOOL THAT IS NOT OF ITS OWN MAKING, THAT THAT'S THE  
5 THIRD PARTY THAT'S SOMEHOW INVADING THE COMMUNICATION.

6 THE COURT: WELL, IS IT BECAUSE -- ALL RIGHT. MAYBE  
7 I -- IS IT BECAUSE THE USER GOES ONTO THE WHAT IF WEBSITE --  
8 AND I'M MAKING THE ARGUMENT NOW FOR THE PLAINTIFF AND TO SEE IF  
9 THIS IS THE ARGUMENT -- THE USER GOES ONTO THE WHAT IF WEBSITE,  
10 AND THERE THEN IS A SCREEN THAT COMES IN OUT OF LEFT FIELD FROM  
11 ACTIVEPROSPECT AND IT DEMANDS TO KNOW THE NAME AND ADDRESS AND  
12 PHONE NUMBER. AND THEN, INSTEAD OF GIVING THAT INFORMATION TO  
13 WHAT IF, ACTIVEPROSPECT CARRIES THAT INFORMATION OFF TO ITS OWN  
14 SERVER AND THEN SOMEHOW THAT'S THE WIRETAP, IS THAT THE  
15 ARGUMENT?

16 I'M TRYING TO UNDERSTAND WHAT THE ARGUMENT HERE IS AND WHY  
17 A THIRD PARTY MAKES A DIFFERENCE.

18 MS. MAZZUCHETTI: IT'S A LITTLE --

19 THE COURT: A POSSIBLE DIFFERENCE.

20 MS. MAZZUCHETTI: APOLOGIES.

21 IT'S A LITTLE DIFFERENT THAN THAT, YOUR HONOR. THE FORM  
22 IS ACTUALLY WHAT IF'S FORM, AND WHAT IF ELECTED TO USE THIS  
23 SCRIPT PROVIDED BY ACTIVEPROSPECT THAT SIMPLY ALLOWS WHAT IF TO  
24 COLLECT INFORMATION ABOUT THOSE MOUSE MOVEMENTS, THE  
25 INFORMATION -- THE KEYSTROKES. IT ALLOWS WHAT IF TO USE A TOOL

1 THAT I DON'T THINK WHAT IF WAS ABLE TO COME UP WITH ON ITS OWN  
2 TO CAPTURE THOSE ELEMENTS AND THOSE EVENTS.

3 AND YES, ACTIVEPROSPECT DOES STORE IT FOR WHAT IF, BUT  
4 IT'S NOT MAKING ANY OTHER COMMERCIAL PURPOSE OR USE OF IT.

5 THE REASON I MENTIONED THE THIRD PARTY PIECE IS BECAUSE  
6 THAT'S THE ESSENTIAL PIECE TO PLAINTIFF'S CLAIM THAT THERE IS  
7 THIS THIRD PARTY THAT THEY ARE ARGUING IS RECORDING THE  
8 CONVERSATION -- THE COMMUNICATION.

9 BUT, BY THE WAY, 631 DOESN'T ADDRESS RECORDINGS. IT'S  
10 ONLY WIRETAPS. IT'S NOT THE RECORDING PIECE OF THE STATUTE.

11 BUT THAT IS PLAINTIFF'S ARGUMENT, THAT BECAUSE  
12 ACTIVEPROSPECT IS BEING USED AT ALL, THAT THAT TRANSFORMS  
13 ORDINARY INTERNET FUNCTIONING AND USING THE THIRD PARTY TOOLS  
14 THAT ARE AT ISSUE IN MANY OF THESE CASES INTO A WIRETAP.

15 AND FOR A VARIETY OF REASONS, MOST NOTABLY THERE'S NO  
16 INTERCEPTION IN TRANSIT, THERE'S NONE ALLEGED IN THE COMPLAINT,  
17 THAT'S SOMETHING THAT YOUR HONOR COULD DECIDE QUITE EASILY AT  
18 THE PLEADING STAGE, THAT THEY DIDN'T ALLEGE A CRITICAL ELEMENT.

19 THE COURT: HOLD ON. I WANT TO HEAR FROM THE  
20 PLAINTIFF. WE'RE TRYING TO SAY WHAT THE PLAINTIFF'S ARGUMENT  
21 WAS. LET ME FIND OUT FROM THE PLAINTIFF.

22 WHAT EXACTLY IS THE WIRETAP AND WHAT IS THE ROLE OF THE  
23 THIRD PARTY VERSUS THE FIRST PARTY SO I CAN UNDERSTAND YOUR  
24 THEORY BETTER?

25 MR. PELUSO: SURE, YOUR HONOR.

1 I THINK DEFENSE COUNSEL ACCURATELY SUMMARIZED OUR CLAIM,  
2 THAT ACTIVEPROSPECT IS THE THIRD PARTY THAT IS INTERCEPTING THE  
3 COMMUNICATION HERE.

4 ACTIVEPROSPECT LIKES TO MAKE THE ARGUMENT THAT IT'S MERELY  
5 A TOOL THAT'S BEING USED TO, I GUESS, CAPTURE SORT OF NOT  
6 REALLY PERTINENT INFORMATION.

7 BUT WITH THIS PARTICULAR WEBSITE, THE NAME, THE ADDRESS,  
8 THE PHONE NUMBER, THAT IS THE KEY CONTENT THAT WHAT IF IS  
9 TRYING TO GET. IT'S A VERY SIMPLE WEBSITE, LEAD GENERATION  
10 WEBSITE THAT THEY'RE TRYING TO CAPTURE THIS INFORMATION SO THAT  
11 THEY CAN LATER ON --

12 THE COURT: THE "THEY" IS WHO NOW? WHAT IF? WHO IS  
13 THE --

14 MR. PELUSO: SO THE LEAD GENERATOR IS WHAT IF.

15 AND A LEAD GENERATOR IS A COMPANY THAT OPERATES THESE VERY  
16 BARE BONES WEBSITES, AND THEIR ENTIRE GOAL IS TO GET PEOPLE TO  
17 GO ON THE WEBSITE, SUBMIT THEIR NAME, PHONE NUMBER, VERY BASIC  
18 INFORMATION, AND TO THEN CAPTURE THAT INFORMATION AND CALL THEM  
19 FOR TELEMARKETING PURPOSES, RIGHT?

20 SO ACTIVEPROSPECT COMES IN AS A THIRD PARTY THAT A LOT OF  
21 LEAD GENERATORS IN THIS DAY AND AGE USE.

22 THE COURT: WHAT DO YOU CALL IT, LEAD GENERATORS?

23 MR. PELUSO: LEAD GENERATORS.

24 THE COURT: L-E-A-D?

25 MR. PELUSO: CORRECT, YOUR HONOR.

1 THE COURT: WHAT DOES THAT MEAN, LEAD GENERATOR?

2 MR. PELUSO: SO IN THE TELEMARKETING WORLD, THERE ARE  
3 THESE COMPANIES THAT I REFER TO AS LEAD GENERATORS, AND THEIR  
4 ENTIRE EXISTENCE IS CAPTURING NAMES AND PHONE NUMBERS TO THEN  
5 TURN AROUND AND EITHER CALL THEM DIRECTLY OR TO SELL THAT  
6 INFORMATION TO OTHER TELEMARKETERS.

7 SO THE WHOLE PURPOSE IS TO JUST GET SOMEONE'S PHONE  
8 NUMBER, NAME, AND THEN SUPPOSED CONSENT.

9 THE COURT: NOW, WAIT A MINUTE. COUNSEL, THOUGH,  
10 TOLD ME THE PURPOSE WAS FOR TELEMARKETING COMPLIANCE, OR  
11 SOMETHING LIKE THAT.

12 SO -- THAT THIS WAS STATUTORILY REQUIRED.

13 MR. PELUSO: NOT STATUTORILY REQUIRED.

14 BUT UNDER THE FEDERAL TELEPHONE CONSUMER PROTECTION ACT,  
15 WHICH IS A, I WOULD SAY, HOTLY LITIGATED STATUTE IN --

16 THE COURT: YEAH, WE GET OUR SHARE OF THOSE CASES.

17 MR. PELUSO: CORRECT. SO UNDER THE TCPA, IF A  
18 PLAINTIFF FILES SUIT AND SAYS, "HEY, YOU CALLED ME USING AN  
19 AUTO DIALER, THAT WAS ILLEGAL," A COMMON DEFENSE IS TO SAY,  
20 "WELL, YOU PROVIDED YOUR PRIOR EXPRESS WRITTEN CONSENT TO BE  
21 CALLED, SO WE CAN'T BE LIABLE UNDER THE TCPA IF YOU CONSENTED  
22 TO BEING CALLED IN THE FIRST PLACE," AND THAT'S WHERE  
23 ACTIVEPROSPECT COMES IN WHERE THE LEAD GENERATION WEBSITES, THE  
24 WEBSITES THAT ARE SELLING NAMES AND PHONE NUMBERS TO  
25 TELEMARKETERS, THEY WANT TO HAVE PROOF THAT THE PERSON WHO WENT

1 TO THE WEBSITE PROVIDED PRIOR EXPRESS CONSENT.

2 IT'S ESSENTIALLY ACTIVEPROSPECT'S ENTIRE BUSINESS MODEL,  
3 AS I UNDERSTAND IT ANYWAY, IS TO SERVICE THE TELEMARKETING --  
4 TELEMARKETING SIDE OF THE -- THE TELEMARKETER SIDE OF THE  
5 TELEMARKETING INDUSTRY TO PROVIDE THEM WITH AN ARGUMENT THAT  
6 THEY CAN MAKE IF THEY'RE SUED FOR VIOLATING THE TCPA.

7 THE COURT: WHERE IS THE CONSENT? IS IT IN THE TERMS  
8 AND CONDITIONS SOMEWHERE?

9 MR. PELUSO: I THINK IN THIS CASE THAT'S RIGHT, YOUR  
10 HONOR.

11 YOU KNOW, WHETHER -- AND THAT SORT OF GOES TO OUR ARGUMENT  
12 ABOUT WHETHER THERE'S AN ARBITRATION AGREEMENT IN THE FIRST  
13 PLACE.

14 I THINK THE WAY THIS WEBSITE IS LAID OUT IS, IS NOT  
15 SUFFICIENT -- PERTINENT IN THIS CASE, NOT SUFFICIENT TO HAVE  
16 THE WEBSITE VISITOR AGREE TO ARBITRATE.

17 BUT IF THIS WERE A TCPA CASE, I WOULD BE ARGUING THAT THAT  
18 CONSENT IS, IS INVALID BECAUSE IT'S JUST BURIED IN THESE TERMS  
19 THAT NO ONE ACTUALLY MANIFESTS ASSENT TO.

20 THE COURT: BUT HERE'S WHAT I'M STILL NOT GETTING.  
21 YOU'RE HELPING ME UNDERSTAND BETTER, BUT I DON'T EVEN KNOW WHAT  
22 WHAT IF HOLDINGS IS. WHAT IS WHAT IF HOLDINGS?

23 MR. PELUSO: AS I UNDERSTAND IT, IT IS A LEAD  
24 GENERATION COMPANY. THEY HAVE A WHOLE BUNCH OF DIFFERENT  
25 WEBSITES. YOU KNOW, THIS ONE IS CALLED "CLAIM MY CASH" OR

1           SOMETHING LIKE THAT.

2           THEY HAVE VERY BARE BONES WEBSITES THAT PEOPLE JUST CLICK  
3           A LINK OR, YOU KNOW, MAYBE THERE'S A LINK ON FACEBOOK OR  
4           THERE'S A BANNER AD THAT MAYBE THEY CLICK ON, THEY'RE ENTICED  
5           BY THE PROMISE OF A GIFT CARD OR SOMETHING LIKE THAT.

6           THEY GET ON THE WEBSITE, THERE'S A VERY SIMPLE LANDING  
7           PAGE WHERE PEOPLE ARE ASKED TO INPUT THEIR PHONE NUMBER, NAME,  
8           MAYBE EMAIL ADDRESS, MAYBE MAILING ADDRESS, AND THEN CLICK, YOU  
9           KNOW, A BIG GREEN BUTTON ON THE PROMISE THAT MAYBE THEY'RE  
10          GOING TO GET SOME CASH OR THEY'RE GOING TO GET A GIFT CARD OR  
11          SOMETHING.

12          ONCE SOMEONE DOES THAT, WHAT IF HAS THAT INFORMATION AND  
13          THEY THEN SELL THAT INFORMATION TO TELEMARKETERS.

14          THE COURT: ALL RIGHT. OKAY. I JUST -- I  
15          MISUNDERSTOOD A FEATURE HERE.

16          I THOUGHT THAT WHAT IF WAS SOMETHING LIKE FACEBOOK OR  
17          GOOGLE AND THAT ACTIVEPROSPECT WAS A WHOLLY DIFFERENT OUTFIT  
18          AND THAT ACTIVEPROSPECT -- THAT WHAT IF WAS RUNNING A MAJOR,  
19          BIG TIME WEBSITE AND THAT ACTIVEPROSPECT WAS COMING IN WITH ITS  
20          WINDOW COLLECTING THIS INFORMATION.

21          BUT WHAT YOU'RE TELLING ME IS, NO, WHAT IF IS THE HOLDING  
22          COMPANY FOR ACTIVEPROSPECT.

23          MR. PELUSO: NO, THAT'S -- THAT'S NOT CORRECT, YOUR  
24          HONOR.

25          THE COURT: ALL RIGHT.

1 MR. PELUSO: THEY'RE DEFINITELY TWO COMPLETELY  
2 SEPARATE ENTITIES.

3 SO WHAT IF OPERATES THESE WEBSITES, "CLAIM MY CASH,"  
4 WHATEVER THIS PARTICULAR ONE IS CALLED, AND I'M SURE DOZENS OR  
5 HUNDREDS OF OTHER WEBSITES THAT ARE VERY SIMILAR.

6 THEY ARE A LEAD GENERATION COMPANY. WHAT IF IS A LEAD  
7 GENERATION COMPANY. THEIR BUSINESS MODEL IS GETTING PEOPLE TO  
8 GO TO THE WEBSITE, ENTER THEIR PHONE NUMBER AND NAME, CLICK THE  
9 GREEN BUTTON, AND ONCE THEY DO THAT, WHAT IF THEN TURNS AROUND  
10 AND SELLS THAT LEAD, THAT PHONE NUMBER, AND SUPPOSED CONSENT TO  
11 BE CALLED TO OTHER TELEMARKETERS.

12 BECAUSE NO ONE -- I DON'T KNOW. I DON'T MEAN TO DISPARAGE  
13 THE COMPANY, BUT NO ONE REALLY KNOWS WHO WHAT IF IS, RIGHT?  
14 LIKE, SOMEONE GOES TO THIS WEBSITE, THEY CLICK ON IT, MAYBE  
15 THREE DAYS LATER THEY START GETTING CALLS ABOUT CAR INSURANCE  
16 OR CAR WARRANTIES OR WHATEVER IT MAY BE.

17 PEOPLE AREN'T GOING TO REMEMBER, OR ARE NOT GOING TO  
18 CONNECT THAT PHONE CALL TO THIS WEBSITE THEY WENT TO THREE DAYS  
19 BEFORE ON THE PROMISE OF A GIFT CARD, RIGHT?

20 SO THAT'S WHERE ACTIVEPROSPECT COMES IN. WHAT IF HIRES,  
21 PARTNERS WITH ACTIVEPROSPECT TO MONITOR THE ACTIVITY ON ITS  
22 WEBSITE SO THAT WHEN SOMEONE TURNS AROUND AND SUES FOR  
23 RECEIVING THE TELEMARKETING CALL, WHAT IF AND WHAT IF'S  
24 PARTNERS ARE ARMED WITH A DEFENSE OF PRIOR EXPRESS WRITTEN  
25 CONSENT.

1 SO ACTIVEPROSPECT IS THE SOFTWARE THAT ALLOWS THEM TO HAVE  
2 THAT SUPPOSED PROOF THAT, 'HEY, YOU WENT TO THIS WEBSITE, YOU  
3 ENTERED YOUR INFORMATION, YOU CLICKED 'SEARCH FOR CASH' OR  
4 WHATEVER THE BUTTON MAY SAY, AND BECAUSE OF THAT, YOU AGREED TO  
5 RECEIVE THIS CALL, THEREFORE, THAT CALL DOESN'T VIOLATE THE  
6 TCPA."

7 ACTIVEPROSPECT ESSENTIALLY RUNS A, A TCPA DEFENSE  
8 BUSINESS, IN A SENSE. IT ALLOWS COMPANIES TO TRACK THE  
9 INFORMATION THAT HAPPENS ON THE WEBSITE SO THAT THEY CAN THEN  
10 TURN AROUND AND SHOW THE COURT AND PLAINTIFF'S ATTORNEYS THAT,  
11 "HEY, YOUR CLIENT ACTUALLY WENT TO THIS WEBSITE AND AGREED TO  
12 BE CONTACTED."

13 SO -- BUT IN ORDER TO DO THAT, THE WHAT IF'S OF THE WORLD  
14 WANT TO HAVE A RECORD OF EXACTLY WHAT HAPPENED DURING THE TCPA  
15 PLAINTIFF'S INTERACTION ON THE WEBSITE.

16 THE COURT: WHAT ARE SOME OTHER LEAD -- WHAT DID YOU  
17 CALL THEM? -- LEAD GENERATORS, ASIDE FROM WHAT IF? GIVE ME  
18 SOME EXAMPLES OF OTHERS THAT I MIGHT HAVE HEARD OF.

19 MR. PELUSO: OH, GOSH, YOUR HONOR. I THINK  
20 MR. RAMSEY MAY BE ABLE TO PROVIDE SOME NAMES OF HIS CLIENTS.

21 I'M BLANKING ON SOME NAMES OF COMMON PLAYERS IN THIS  
22 FIELD.

23 THEY'RE NOT -- THEY'RE NOT HOUSEHOLD NAMES, SO IT'S NOT  
24 GOING TO BE FACEBOOK OR TWITTER OR, YOU KNOW, SOME VERY POPULAR  
25 WEBSITE THAT YOU WOULD HAVE HEARD OF.



1 ALL OF THESE COMPANIES OPERATE SORT OF THESE BARE BONES  
2 SORT OF WEBSITES THAT DON'T REALLY DO ANYTHING OTHER THAN  
3 GENERATE LEADS.

4 THE COURT: ALL RIGHT. OKAY. I GOT IT.

5 SO SOMEBODY GOES -- WANTS TO GET A FREE GIFT CARD, THEY  
6 CLICK THE LINK, THE LINK TAKES THEM TO WHAT IF, AND THEN  
7 THERE'S A PAGE THERE THAT SAYS, NAME, ADDRESS, EMAIL. WHY IS  
8 THAT WIRETAPPING?

9 MR. PELUSO: SO WHEN SOMEONE IS TYPING THAT, THAT  
10 NAME -- YOU GO TO A WEBSITE, YOU'RE TYPING IN YOUR NAME, YOUR  
11 EMAIL ADDRESS, YOUR -- WHATEVER INFORMATION IS PROVIDED ON  
12 THERE, YOU'RE NOT EXPECTING THAT ACTIVEPROSPECT IS MONITORING  
13 EVERYTHING YOU'RE DOING, YOU KNOW? MY NAME IS PATRICK, SO  
14 EVERY TIME I TYPE P-A-T-R-I-C-K, YOU'RE NOT EXPECTING THAT  
15 THOSE KEYSTROKES ARE BEING SECRETLY RECORDED BY A THIRD PARTY  
16 THAT DOESN'T OWN THE WEBSITE. YOU'RE SITTING AT THE WEBSITE,  
17 YOU TYPE YOUR NAME, YOU CLICK SUBMIT.

18 OBVIOUSLY WHEN YOU DO THAT, THE UNDERSTANDING IS THAT YOU  
19 ARE PROVIDING THAT INFORMATION TO THE WEBSITE OPERATOR.

20 BUT YOU'RE NOT -- YOU DON'T HAVE A REASONABLE  
21 UNDERSTANDING THAT THERE'S A THIRD PARTY OUT THERE THAT'S  
22 MONITORING WHERE YOUR MOUSE IS GOING AROUND THE SCREEN AND  
23 MONITORING ALL THE STROKES THAT YOU'RE HITTING ON YOUR  
24 KEYBOARD.

25 THAT'S THE WIRETAP. SOMEONE IS GOING TO A WEBSITE,

1 INTERACTING WITH THAT WEBSITE WITHOUT ANY KNOWLEDGE THAT  
2 THERE'S A THIRD PARTY OUT THERE THAT'S TRACKING EVERYTHING  
3 YOU'RE DOING WHILE YOU'RE ON THAT WEBSITE.

4 AND, YOU KNOW, THIS IS A VERY SIMILAR FACT PATTERN TO --

5 THE COURT: OKAY. SO IF ACTIVEPROSPECT IS THE  
6 WIRETAPPER HERE, WELL, THEN, WHY ARE YOU SUING WHAT IF?

7 MR. PELUSO: SO THEY'RE BOTH WIRETAPPING. SO BOTH  
8 THE -- THE WEBSITE OPERATOR, BEFORE SOMEONE HITS "SUBMIT," IS  
9 TRACKING THEIR ACTIVITY ON THE WEBSITE. SO YOU'RE NOT  
10 EXPECTING THAT SOMEONE'S MONITORING YOUR ACTUAL ACTIVITY.

11 ONCE YOU HIT "SUBMIT" OR SOMETHING, "OKAY, I'VE SUBMITTED.  
12 I'VE SENT THAT TO YOU."

13 BUT YOU'RE NOT -- THERE'S NO CONCEPT OR UNDERSTANDING THAT  
14 WHILE YOU'RE INTERACTING WITH THE WEBSITE, SOMEONE'S TRACKING  
15 YOUR MOVEMENTS. SO --

16 THE COURT: YOU MEAN EVEN BEFORE "SUBMIT" IS HIT --

17 MR. PELUSO: EXACTLY.

18 THE COURT: -- IT'S MONITORING IT?

19 MR. PELUSO: EXACTLY. SO IF I GO TO THE WHAT IF  
20 WEBSITE AND I START TYPING IN PATRICK, I'M NOT EXPECTING THAT  
21 SOMEONE IS MONITORING AS I'M TYPING IN P-A-T-R-I-C-K.

22 THE COURT: LET'S SAY YOU DON'T TYPE IN ANYTHING YET  
23 AND YOUR LITTLE ARROW AND CURSOR JUST WANDERS AROUND THE  
24 SCREEN, LEFT TOP, RIGHT TOP, BOTTOM RIGHT, AND JUST WHIMSICALLY  
25 GOES AROUND THE SCREEN. AND BEFORE ANYTHING IS WRITTEN IN THE

1 BOXES, IS IT RECORDING THEN, TOO?

2 MR. PELUSO: THAT'S CERTAINLY OUR ALLEGATION, YOUR  
3 HONOR, THAT, YES, THE SECOND SOMEONE IS GETTING ON THIS WEBSITE  
4 AND STARTING INTERACTING WITH IT, IT'S RECORDING THE  
5 KEYSTROKES, THE MOUSE MOVEMENTS, EVERYTHING THAT'S GOING ON ON  
6 THAT PAGE.

7 THE COURT: HANG ON.

8 IS THAT TRUE THAT'S HOW IT WORKS, IT RECORDS IT EVEN  
9 BEFORE THE "SUBMIT" BUTTON.

10 MS. MAZZUCHETTI: TO USE THE WORD "RECORD," THAT'S  
11 PLAINTIFF'S WORD OF "RECORD."

12 BUT IT'S CAPTURING EVENTS, BUT IT'S CAPTURING THEM ON THE  
13 WEBSITE OWNER'S WEBSITE. IT DOESN'T -- IT'S NOT AN  
14 INTERCEPTION IN TRANSIT. IT IS JUST CAPTURING THE FACT THAT  
15 THOSE EVENTS OCCURRED, YES.

16 THE COURT: WELL, BUT BEFORE -- WHAT IF THE PERSON  
17 DOESN'T HIT "SUBMIT"? THEN THIS -- BUT IT STILL IS CAPTURED?

18 MS. MAZZUCHETTI: IT WOULD NOT MAINTAIN THOSE EVENTS,  
19 BUT IT HAS TO OBVIOUSLY CAPTURE THEM. WHEN THEY HIT "SUBMIT,"  
20 IT WILL THEN CREATE THE VERIFICATION RECORD THAT WOULD BE USED  
21 FOR THE TCPA COMPLIANCE PURPOSES I MENTIONED EARLIER.

22 THE COURT: OKAY.

23 MR. PELUSO: I WOULD JUST POINT OUT, YOUR HONOR, THAT  
24 THIS FACT PATTERN IS, I BELIEVE, COMPLETELY ANALOGOUS WITH THE  
25 NINTH CIRCUIT OPINION IN JAVIER. ACTIVEPROSPECT IS ONE OF THE

1 DEFENDANTS IN THAT CASE.

2 SO IT'S A VERY SIMILAR FACT PATTERN WHERE SOMEONE GOES TO  
3 A WEBSITE, IS INTERACTING WITH THE WEBSITE. THAT INTERACTION  
4 IS, IS INTERCEPTED, RECORDED, CAPTURED, AND IT'S VERY SIMILAR,  
5 THAT THERE WAS A WEBSITE OPERATOR THERE, AS WELL AS --

6 THE COURT: JAVIER VERSUS WHO?

7 MR. PELUSO: YOUR HONOR, IT'S JAVIER VERSUS ASSURANCE  
8 IQ, LLC, AS WELL AS ACTIVEPROSPECT, INC.

9 SO ACTIVEPROSPECT WAS A DEFENDANT IN THAT CASE.

10 THE COURT: WAS THAT IN YOUR BRIEF?

11 MR. PELUSO: I BELIEVE SO, YOUR HONOR.

12 ALSO, I HAVE A COPY OF IT HERE, IF YOU'D LIKE.

13 THE COURT: WOULD YOU HAND THAT UP, PLEASE?

14 MR. PELUSO: (HANDING.)

15 THE COURT: THANKS.

16 WHAT DO YOU SAY TO THE JAVIER CASE?

17 MS. MAZZUCHETTI: WELL, YOUR HONOR, THE JAVIER CASE  
18 WAS INITIALLY DECIDED BY JUDGE WHITE ON A MOTION TO DISMISS  
19 WHERE THE "SUBMIT" BUTTON THAT OCCURRED AT THE VERY END OF THE  
20 FLOW HAD A LINK TO THE POLICY, THE PRIVACY POLICY. SO AFTER  
21 THE ALLEGED RECORDING ALREADY BEGAN, AT THE END OF THE FLOW,  
22 THERE WOULD BE A CLICK THAT AGREED TO THE PRIVACY POLICY.

23 JUDGE WHITE, ON THAT BASIS ALONE, DISMISSED THE CASE,  
24 FINDING THAT THE PLAINTIFF HAD CONSENTED TO THE ALLEGED  
25 RECORDING, IF THERE WAS ONE, OR THE ALLEGED WIRETAP.

1            THAT CASE WAS REMANDED AND IS NOW PRESENTLY BEFORE  
2            JUDGE BREYER, AND ON FRIDAY, JUDGE BREYER IS GOING TO HEAR A  
3            MOTION TO DISMISS AT THE PLEADING STAGE MOTION, AGAIN,  
4            ADDRESSING THESE TYPES OF ARGUMENTS THAT WE'RE MAKING BEFORE  
5            YOUR HONOR, BECAUSE THOSE WERE NOT ADDRESSED BY JUDGE WHITE OR  
6            THE NINTH CIRCUIT, AND UPON REMAND, NOW THE COURT WILL ADDRESS  
7            WHETHER INTERCEPTION -- INTERCEPTION IN TRANSIT WAS  
8            SUFFICIENTLY ALLEGED, WHETHER THERE WAS IMPLIED CONSENT, AND A  
9            VARIETY OF OTHER ARGUMENTS.

10           THE COURT:    SO JUDGE WHITE HAD SAID, IN JAVIER, THAT  
11           THE -- THAT HITTING THE "SUBMIT" BUTTON WAS CONSENT?

12           MS. MAZZUCHETTI:    CORRECT.

13           THE COURT:    AND THEN THE NINTH CIRCUIT SAID, NO, IT'S  
14           NOT CONSENT?

15           MS. MAZZUCHETTI:    WELL, THE NINTH CIRCUIT SAID THAT  
16           THE CONSENT COULDN'T BE RETROACTIVE BECAUSE IF THE RECORDING AS  
17           ALLEGED HAD STARTED, HAD BEGUN EARLIER, THAT THAT WOULDN'T BE  
18           SUFFICIENT CONSENT.

19           AND THAT WAS THE ONLY HOLDING REACHED BY THE NINTH  
20           CIRCUIT.

21           THE COURT:    ALL RIGHT.    AND BOTH JUDGE WHITE AND THE  
22           NINTH CIRCUIT DID OR DID NOT REACH THE ISSUE OF WHETHER IT  
23           CONSTITUTED WIRETAPPING AT ALL?

24           MS. MAZZUCHETTI:    DID NOT REACH IT, YOUR HONOR.

25           THE COURT:    IS THAT RIGHT?

1 MR. PELUSO: THAT'S MY UNDERSTANDING, YOUR HONOR.

2 BUT TO SOME EXTENT IT SEEMS LIKE A THRESHOLD MATTER, TO ME  
3 ANYWAY. IF IT'S NOT WIRETAPPING IN THE FIRST PLACE, THAT'S AN  
4 EASY WAY TO GET RID OF THE CASE. YOU DON'T HAVE TO GET INTO  
5 THE WEEDS OF WHETHER OR NOT THE CONSENT CAN BE RETROACTIVE  
6 CONSENT.

7 THE COURT: SOMETIMES THE JUDGE SEES THE EASIEST WAY  
8 TO GET OUT OF THE WEEDS IS TO GO AGAIN, AND IT MUST BE THAT  
9 JUDGE WHITE THOUGHT THE CONSENT ISSUE WAS THE EASIEST WAY.  
10 SO -- HMM.

11 MR. PELUSO: I WOULD JUST -- THAT'S ACCURATE IS THE  
12 BOTTOM LINE.

13 I WOULD JUST SAY THAT THE ISSUE OF RETROACTIVE CONSENT NOT  
14 BEING A VALID DEFENSE UNDER THE STATE STATUTE, THAT WAS THE  
15 HEART OF JAVIER.

16 WHETHER IT WAS WIRETAPPING IN THE FIRST PLACE, TO ME  
17 ANYWAY, THAT SEEMS LIKE A THRESHOLD ISSUE THAT THE CONSENT  
18 DOESN'T MATTER IF IT WASN'T WIRETAPPING IN THE FIRST PLACE.

19 THE COURT: ALL RIGHT.

20 I NEED TO MOVE TO THE OTHER MOTION, BUT LET ME GIVE EACH  
21 OF YOU A CHANCE TO MAKE ONE OTHER POINT ON THIS ISSUE OF  
22 WIRETAPPING.

23 YOU GET TO GO FIRST, PLEASE.

24 MS. MAZZUCHETTI: THANK YOU, YOUR HONOR.

25 ONE OTHER POINT ON JAVIER. THE FLOW HERE IS VERY

1 DIFFERENT THAN WHAT WAS PRESENTED IN JAVIER. HERE THE PRIVACY  
2 POLICY IS PRESENTED AT THE OUTSET BEFORE ANY ALLEGED RECORDING  
3 BEGINS.

4 I WOULD ENCOURAGE THE COURT TO REVIEW JUDGE BEELER'S  
5 DECISIONS IN NOOM, BLUE NILE, AND YALE V. CLICKTALE. IN THOSE  
6 INSTANCES, THE COURT FOUND, BECAUSE WE'RE DEALING WITH A  
7 SERVICE PROVIDER WHO IS DOING WHATEVER DATA COLLECTION IS  
8 OCCURRING FOR THE WEBSITE OWNER, THERE CAN'T POSSIBLY BE A  
9 THIRD PARTY EAVESDROPPER THAT COULD SUPPORT A WIRETAP.

10 BUT EVEN AN EASIER WAY, THE EASIEST WAY OUT OF THE WEEDS  
11 IN THIS CASE IS THERE'S NO INTERCEPTION IN TRANSIT ALLEGED.

12 THE NINTH CIRCUIT, IN KONOP VERSUS HAWAIIAN AIRLINES, HAD  
13 RECOGNIZED THAT WHEN YOU'RE DEALING WITH INTERNET  
14 COMMUNICATIONS, LIKE THE ONE AT ISSUE HERE, AS WELL AS EMAIL,  
15 THERE IS SUCH A NARROW WINDOW WHERE THERE COULD EVER BE AN  
16 INTERCEPTION IN TRANSIT THAT THE WIRETAP LAWS DON'T REALLY  
17 APPLY TO THESE TYPES OF COMMUNICATIONS BECAUSE, BY DEFINITION,  
18 NOTHING IS HAPPENING WITH AN INTERCEPTION IN TRANSIT.

19 THERE WAS A CASE DECIDED BY --

20 THE COURT: WHAT DO YOU MEAN, INTERCEPTION IN  
21 TRANSIT?

22 MS. MAZZUCHETTI: IT HAD -- THE INTERCEPTION OF THE  
23 COMMUNICATION -- THE CONTENT OF THE COMMUNICATION HAS TO OCCUR  
24 IN BETWEEN THE LEAD -- THE TIME THE COMMUNICATION LEAVES  
25 PLAINTIFF'S COMPUTER AND REACHES THE WEBSITE OWNER'S WEBSITE.

1           THAT IS NOT HOW ACTIVEPROSPECT'S TECHNOLOGY WORKS.  
2           PLAINTIFFS DON'T ALLEGE THAT IT IS. WE'VE ATTACHED THE PATENT  
3           THAT DOESN'T SHOW ANY SORT OF INTERCEPTION IN TRANSIT FEATURE.

4           AND THE WORD "INTERCEPT" ONLY APPEARS ONE PLACE IN  
5           PLAINTIFF'S COMPLAINT, AND THAT'S IN THE CLASS DEFINITION.

6           WHAT THEY COMPLAIN ABOUT IS A RECORDING, WHICH ISN'T  
7           COVERED BY SECTION 631.

8           AND IF YOUR HONOR WERE TO TAKE A LOOK AT THE DECISION THAT  
9           JUDGE STANTON -- JUDGE STATON ISSUED OUT OF THE CENTRAL  
10          DISTRICT OF CALIFORNIA IN IN RE: VIZIO, AT THE PLEADING STAGE,  
11          A WIRETAP CLAIM WAS DISMISSED BECAUSE THE PLAINTIFF HADN'T  
12          SUFFICIENTLY ALLEGED INTERCEPTION IN TRANSIT. THE PLAINTIFF  
13          EVEN TRIED TO MAKE THE ALLEGATION THERE, BUT JUDGE STATON SAID  
14          IT WASN'T SUFFICIENT BECAUSE THERE WEREN'T ENOUGH FACTUAL  
15          ALLEGATIONS ABOUT THE TIMING OF THE PURPORTED INTERCEPTION.

16          AND THIS IS ALSO CONSISTENT WITH THE DECISION REACHED BY  
17          JUDGE ORRICK OUT OF THE NORTHERN DISTRICT IN NOVELPOSTER VERSUS  
18          JAVITCH, WHICH IS CITING THAT NINTH CIRCUIT CASE LAW AND  
19          ACKNOWLEDGING THAT WIRETAP JUST DOESN'T FIT THESE INTERNET  
20          COMMUNICATIONS BECAUSE YOU'RE NEVER GOING TO HAVE THAT  
21          INTERCEPTION IN TRANSIT. IT'S TYPICALLY, ALMOST ALWAYS, COMING  
22          OUT OF STORAGE, WHICH TAKES IT OUT OF THE SCOPE OF A  
23          WIRETAPPING CLAIM.

24          NOW, THIS WASN'T AN ISSUE THAT WAS REACHED BY JUDGE BEELER  
25          IN THE DECISIONS I MENTIONED, BECAUSE IN THAT -- THE COURT HAD



1 FOUND IN THOSE CASES THAT IT'S NOT A THIRD PARTY EAVESDROPPER.

2 SO THERE ARE A VARIETY OF WAYS TO GET TO A DISMISSAL HERE  
3 OF THE CIPA CLAIM, BUT I THINK IT'S VERY CLEAR THAT THIS TYPE  
4 OF TECHNOLOGY -- WHICH, BY THE WAY, ISN'T IN THE BUSINESS OF  
5 CREATING TCPA DEFENSE, IT'S CREATING LEGITIMACY FOR THE LEAVE  
6 FORMS, CREATING THE RECORD -- THE TCPA REQUIRES A RECORD OF  
7 CONSENT THAT'S GOING TO SAY, THIS IS WHAT A CONSUMER SAW.

8 WHETHER IT'S SUFFICIENT OR NOT IS NOT IN ACTIVEPROSPECT'S  
9 BUSINESS. IT'S JUST CAPTURING FOR A COMPLIANCE RECORD OF WHAT  
10 A CONSUMER SAW AND WHAT THEY INTERACTED WITH.

11 AND WHATEVER THE ANSWER WILL BE UNDER THE TCPA, IT IS WHAT  
12 IT IS. BUT IT'S CERTAINLY NOT A BUSINESS THAT'S INTENDED TO,  
13 YOU KNOW, HELP BREAK THE LAW. IN FACT, IT'S SUPPOSED TO --  
14 IT'S INTENDED TO SUPPORT CONSUMERS AND MAKE SURE THAT FOLKS WHO  
15 ARE NOT WANTING TO RECEIVE THESE TYPES OF PHONE CALLS THAT  
16 PLAINTIFF'S COUNSEL MENTIONED DON'T RECEIVE THEM. IT'S TRYING  
17 TO BRING LEGITIMACY, AS I SAID.

18 THE COURT: ALL RIGHT.

19 WHAT DO YOU SAY TO THE INTERCEPTION IN TRANSIT POINT?

20 MR. PELUSO: WHAT I SAY IS THAT AT THIS STAGE OF THE  
21 CASE, OUR ALLEGATIONS HAVE TO BE TAKEN AS TRUE.

22 AND IT SEEMS TO -- IT SEEMS TO ME THAT THE ARGUMENT BOILS  
23 DOWN TO A MAGIC WORD DEFENSE AT THIS POINT, THAT, YOU KNOW, WE  
24 DON'T SPECIFICALLY SAY "INTERCEPT" ENOUGH FOR ACTIVEPROSPECT'S  
25 LIKING.

1 I MEAN, IF YOU LOOK AT THE COMPLAINT, WE SAY THAT WILLIAMS  
2 VISITED THIS WEBSITE. DURING THAT VISIT, THE TRUSTEDFORM  
3 REPLAY FUNCTION CREATED A VIDEO THAT CAPTURED WILLIAMS'S  
4 KEYSTROKE AND CLICKS. TRUSTEDFORM ALSO RECORDED WILLIAMS'S  
5 NAME.

6 SO WHETHER WE SAY "CAPTURED" OR "RECORDED" OR  
7 "INTERCEPTED," I DON'T SEE HOW THE ALLEGATIONS OF THE  
8 COMPLAINT, YOU KNOW, WOULD FAIL --

9 THE COURT: WELL, BUT THE ANALOGY -- I FIND THIS  
10 PRETTY INTERESTING. I THINK I'M RIGHT ABOUT THIS. LET'S  
11 SAY -- LET'S GO BACK TO THE ELIOT NESS DAYS, YOU KNOW. DO YOU  
12 KNOW WHO HE WAS, ELIOT NESS? PROBABLY NOBODY KNOWS.

13 MR. PELUSO: I'VE HEARD THE NAME.

14 THE COURT: HE WAS THE -- HE WAS A FEDERAL AGENT BACK  
15 IN THE AL CAPONE DAYS. BUT THEY DID HAVE TELEPHONES THEN, AND  
16 THEY DID HAVE THE ABILITY TO WIRETAP IN THOSE DAYS.

17 ALL RIGHT. SO LET'S GO BACK TO THAT SIMPLER ERA THAT I  
18 CAN UNDERSTAND. AND SO AL CAPONE CALLS UP HIS FRIEND IN  
19 DETROIT AND THE -- I'LL GIVE YOU TWO SCENARIOS.

20 SCENARIO NUMBER 1 IS THAT THE FRIEND IN DETROIT HAS GOT IT  
21 ON SPEAKER PHONE -- THEY DIDN'T HAVE SPEAKER PHONES THEN -- BUT  
22 THEY'VE GOT IT ON SPEAKER PHONE AND, UNBEKNOWNST TO  
23 MR. DETROIT, THE GOVERNMENT HAD PUT AN EAVESDROPPING WIRE --  
24 NOT A WIRETAP -- EAVESDROPPING MICROPHONE IN THE ROOM, AND SO  
25 EVERYTHING IS RECORDED.

1 BUT IT'S NOT INTERCEPTED BECAUSE THE TELEPHONE LINE,  
2 THE --

3 MR. PELUSO: I THINK I UNDERSTAND.

4 THE COURT: THE COMMUNICATION IS ACTUALLY AN  
5 ELECTRICAL COMMUNICATION. IT'S REACHING DETROIT AND THEN BEING  
6 PUT OVER THE SPEAKER, AND THEN IT'S FROM THE SPEAKER THAT THE  
7 RECORDING IS MADE. SO I CAN SEE THAT THAT WOULD NOT BE A  
8 WIRETAP.

9 ON THE OTHER HAND, IF THE -- IF THEY WENT DOWN TO THE  
10 SERVICE BOX ON THE STREET OUTSIDE THE HOUSE OF THE GANGSTER AND  
11 THEN THEY WIRED THEMSELVES INTO THAT SERVICE BOX, THAT WOULD BE  
12 WIRETAPPING.

13 NOW, IN -- I THINK THIS ILLUSTRATES WHAT I'M GOING TO COME  
14 TO, AND THAT IS IN OUR CASE, IN YOUR CASE, WHAT IS THE -- ARE  
15 THE SIGNALS THAT ARE COMING FROM KEYSTROKES FROM THE POTENTIAL  
16 CUSTOMER, ARE THEY BEING -- ARE THEY BEING CAPTURED WHILE  
17 THEY'RE IN TRANSIT TO THE WEBSITE, OR THEY HIT THE WEBSITE  
18 SERVER SOMEWHERE -- I DON'T KNOW WHERE IT WOULD BE -- AND THEN  
19 THEY GET RECORDED? HOW DOES IT WORK?

20 MR. PELUSO: OUR UNDERSTANDING, YOUR HONOR, AND HOW  
21 WE ALLEGED IS THAT THE KEYSTROKES AND THE MOUSE MOVEMENTS ARE  
22 BEING CAPTURED, RECORDED, INTERCEPTED, WHATEVER WORD YOU WANT  
23 TO USE, AT THE TIME THEY'RE BEING MADE.

24 SO IT IS MORE ANALOGOUS TO THE POINT WHERE SOMEONE IN  
25 DETROIT IS OUT AT THE PHONE BOX TAPPING INTO THE LINE THAN IT

1 IS THAT THERE'S, YOU KNOW, A MICROPHONE IN AL CAPONE'S LIVING  
2 ROOM.

3 I THINK THE OVERARCHING POINT HERE IS THAT THIS IS A  
4 12(B) (6) MOTION AND OUR PLEADINGS HAVE TO BE ACCEPTED AS TRUE  
5 AT THIS STAGE.

6 SO SOME OF THESE OTHER ISSUES THAT MAY BE SUMMARY JUDGMENT  
7 ISSUES THAT NEED TO GET WORKED OUT THROUGH DISCOVERY ARE  
8 RELEVANT POINTS, BUT I FEEL LIKE WE'RE WAY TOO PREMATURE AT  
9 THIS POINT TO, YOU KNOW, BEFORE ANY DISCOVERY, TO BE SORT OF  
10 TALKING ABOUT PRECISELY HOW THIS WORKS.

11 THE COURT: OKAY. LET ME ASK THE OTHER SIDE.

12 HOW DO YOU -- AND COUNSEL MAY BE RIGHT ABOUT BEING STUCK  
13 WITH WHAT'S IN THE COMPLAINT, BUT HOW DOES IT WORK IN YOUR  
14 VIEW? HOW DOES IT ACTUALLY WORK?

15 MS. MAZZUCHETTI: AS I UNDERSTAND IT, YOUR HONOR,  
16 EVERYTHING COMES OUT OF STORAGE. IT'S LIKE ANY OTHER INTERNET  
17 COMMUNICATION. IT'S NOTHING -- YOU KNOW, IT -- NOTHING IS --

18 THE COURT: WHAT DID YOU MEAN, STORAGE?

19 MS. MAZZUCHETTI: THERE'S NO INTERCEPTION IN TRANSIT.

20 THE COURT: IT COMES OUT OF WHAT STORAGE?

21 MS. MAZZUCHETTI: SO, FOR EXAMPLE, A LOT OF --  
22 SOMETIMES THESE TYPES OF ISSUES COME UP IN THE CONTEXT OF  
23 EMAIL, CAN AN EMAIL BE INTERCEPTED IN TRANSIT, AND THE ANSWER  
24 IS ALMOST ALWAYS NO, BECAUSE EVEN IF YOU WERE TO BE CAPTURING  
25 THE CONTENT OF THE EMAIL, YOU'RE EITHER GETTING IT ON THE

1 PERSON SENDING'S SIDE OR THE RECIPIENT'S SIDE. EVEN IF YOU GET  
2 IT -- EVEN IF YOU'RE ABLE TO INVADE THAT COMMUNICATION A  
3 MILLISECOND LATER, IT HAPPENS SO QUICKLY, IT'S ALREADY ARRIVED.

4 AND HERE THE PLAINTIFF'S INTERACTION WITH THE WEBSITE,  
5 IT'S ALREADY ARRIVED BY THE TIME ACTIVEPROSPECT'S GATHERING  
6 THOSE DATA POINTS.

7 BUT I THINK MOST IMPORTANTLY HERE, PLAINTIFF IS STUCK WITH  
8 THEIR COMPLAINT. THEY DON'T ALLEGE IT. THERE'S NOTHING  
9 ALLEGED ABOUT AN INTERCEPTION IN TRANSIT. AS I SAID, THEY  
10 DON'T EVEN USE THE WORD "INTERCEPTION." THEY USE THE WORD  
11 "RECORDING" WHERE THERE'S ANOTHER -- THERE ARE OTHER PROVISIONS  
12 OF THE STATUTORY SCHEME THAT RELATE TO RECORDING THAT I THINK  
13 PLAINTIFF DIDN'T PLEAD BECAUSE THOSE ARE NOT APPLICABLE HERE.

14 BUT THIS PARTICULAR -- THIS PROVISION IS ABOUT  
15 WIRETAPPING, AND THEY USE THE WORD "RECORDING." RECORDING  
16 ISN'T A WIRETAP.

17 THE COURT: ALL RIGHT. ALL RIGHT. OKAY. WE'VE GOT  
18 TO MOVE ON.

19 SO LET'S GO TO THE ARBITRATION MOTION FOR A SECOND.

20 MS. MAZZUCHETTI: THIS IS -- WE ARE -- WE FILED A  
21 JOINDER TO THE ARBITRATION MOTION, BUT THIS IS MY  
22 CO-DEFENDANT'S MOTION IN THE FIRST INSTANCE.

23 THE COURT: ALL RIGHT.

24 OKAY. THANK YOU.

25 MR. RAMSEY: THANK YOU, YOUR HONOR.

1 THE COURT: LET'S HEAR FROM ARBITRATION.

2 MR. RAMSEY: SURE. AND IF YOUR HONOR WOULDN'T MIND,  
3 WHAT IF ALSO MOVED TO DISMISS, AND THERE'S SOME THINGS ABOUT  
4 OUR WEBSITE THAT I'D LIKE TO CLARIFY AND MAKE A FEW POINTS.

5 THE COURT: YOU CAN TAKE YOUR MASK OFF IF YOU WISH.

6 MR. RAMSEY: I'M SORRY.

7 THE COURT: THAT'LL ALLOW ME TO HEAR YOU A LITTLE  
8 BETTER.

9 MR. RAMSEY: NO PROBLEM. I GET USED TO IT, RIGHT?

10 WHAT IF ALSO MOVED TO DISMISS ON SIMILAR GROUNDS, AND  
11 THERE WERE SOME THINGS ABOUT THE WEBSITE THAT I'D LIKE TO  
12 EXPLAIN.

13 THE COURT: ARE THESE THINGS THAT ARE IN THE  
14 COMPLAINT, OR IS THIS JUST YOUR SUMMARY JUDGMENT MATERIAL,  
15 WHICH COULD CAUSE ME TO DENY YOUR MOTION, WHICH WILL MEAN  
16 DISCOVERY? SO DON'T GO OUTSIDE THE FOUR CORNERS OF THE  
17 COMPLAINT.

18 MR. RAMSEY: NO, NO, NO. WE MOVED TO DISMISS ON  
19 SIMILAR GROUNDS AS ACTIVEPROSPECT.

20 THE COURT: BUT DID YOU MOVE OUTSIDE THE COMPLAINT?

21 MR. RAMSEY: NO, NOT WITH RESPECT TO WHAT I'M TALKING  
22 ABOUT.

23 THE COURT: ALL RIGHT. OKAY. GO AHEAD AND MAKE YOUR  
24 POINT.

25 MR. RAMSEY: OKAY. SO WHAT IF -- IT'S WHAT IF'S

1 WEBSITE. THE FIRST THING THAT HAPPENS IS SOMEONE LANDS ON IT  
2 IN ONE SCREEN. THEY ENTER THEIR EMAIL ADDRESS, AND THEN THEY  
3 ARE ASKED TO CLICK A BUTTON TO CONTINUE WITH THE REGISTRATION  
4 PROCESS.

5 IT'S ON THAT PAGE, THAT VERY FIRST PAGE, THAT YOU GET THE  
6 NOTICE OF ARBITRATION AND THE PRIVACY POLICY. AND I'M GOING TO  
7 COME BACK TO THAT.

8 THERE'S NO ALLEGATION THAT ON THAT FIRST PAGE THERE'S ANY  
9 RECORDING OR INTERCEPTION GOING ON.

10 THE PERSON THEN CLICKS THE BUTTON TO REGISTER TO MOVE ON,  
11 AND THEY GO THROUGH DIFFERENT STEPS OF THE WEBSITE. IT'S LIKE  
12 MAKING A PURCHASE ON AMAZON. YOU CLICK -- YOU MIGHT ENTER YOUR  
13 BILLING INFORMATION, YOUR SHIPPING ADDRESS, YOU CLICK THROUGH A  
14 FEW SCREENS, AND THEN EVENTUALLY YOU GET TO THE LAST PAGE,  
15 WHICH IS A SEPARATE PAGE FROM THE EARLIER SCREEN WITH THE  
16 ARBITRATION PROVISION AND THE PRIVACY POLICY.

17 AND IT IS ON THAT SCREEN WHERE WE ASK FOR TCPA CONSENT,  
18 AND IF THEY CHECK THE BOX THAT SAYS, "I CONSENT UNDER THE  
19 TCPA," THEN WHAT IF MAY SELL THAT INFORMATION TO ONE OF ITS  
20 CLIENTS FOR MARKETING PURPOSES.

21 UNDER THE TCPA, AS I THINK YOU RECOGNIZED, THERE'S AN  
22 OBLIGATION, OBVIOUSLY, TO GET CONSENT, BUT ALSO TO KEEP RECORDS  
23 OF THAT CONSENT AND TO MAKE SURE THAT THE CONSENT IS VALID.

24 WE GET CHALLENGES ALL THE TIME UNDER THE TCPA, "I DIDN'T  
25 CONSENT."

1 SO NOW, WELL, HOW DO I GO ABOUT PROVING IT?

2 SO IF WHAT IF WERE ABLE TO WRITE ITS OWN CODE TO HAVE RUN  
3 ON ITS OWN WEBSITE TO CAPTURE INFORMATION SHOWING THAT THAT  
4 PERSON AT THIS TIME FROM THIS I.P. ADDRESS, ET CETERA, CHECKED  
5 THE BOX ON THE TCPA CONSENT PAGE AND CLICKED "YES," IT WOULD  
6 HAVE DONE SO.

7 INSTEAD, IT HIRES A THIRD PARTY SOFTWARE -- IT'S LIKE  
8 GOING TO -- IN THE OLDEN DAYS, YOU WOULD GO TO TARGET MAYBE AND  
9 GET MICROSOFT WORD AND JUST BUY THE SOFTWARE, IT INSTALLS IT ON  
10 ITS WEBSITE, AND NOW A VENDOR, WHO'S ACTIVEPROSPECT --  
11 "RECORDS" IN THE WRONG WORD IN MY OPINION -- BUT RECORDS THE  
12 INFORMATION THAT THE WEBSITE, THE PERSON ON THE WEBSITE INPUTS  
13 ON THAT PAGE.

14 I THINK THAT'S RELEVANT FOR A FEW REASONS. NUMBER ONE,  
15 WITH RESPECT TO CONSENT, THE CONSENT ARGUMENT WE'RE MAKING IS  
16 THAT THE CONSENT HAPPENED ON PAGE 1 WHERE THE TERMS AND  
17 CONDITIONS AND PRIVACY POLICY WAS.

18 THAT MAKES IT DIFFERENT THAN THE JAVIER CASE THAT YOU  
19 TALKED ABOUT WHERE THE RECORDING STARTS ON PAGE 1 AND THEY  
20 CLICK THROUGH TO PAGE 2, 3, 4, AND IT'S ONLY ON PAGE 4 WHERE  
21 THEY GET TO CONSENT, AND THE BASIS OF THE NINTH CIRCUIT'S  
22 RULING WAS, "WELL, NO, YOU CAN'T -- YOU RECORDED OVER HERE.  
23 YOU CAN'T GO THROUGH THE WHOLE PROCESS AND GET CONSENT AND HAVE  
24 THAT APPLY RETROACTIVELY."

25 SO THAT'S WHY JAVIER, IN OUR VIEW, IS COMPLETELY



1 IRRELEVANT AND DOESN'T GET TO OUR CONSENT ISSUE OR THE WIRETAP  
2 ISSUE. SO THAT'S ONE POINT I WANT TO MAKE.

3 ON THE WIRETAPPING ISSUE --

4 THE COURT: WAIT A MINUTE. I ASKED YOU TO TALK ABOUT  
5 ARBITRATION. YOU HAVEN'T TALKED ABOUT ARBITRATION, AND I -- I  
6 TELL YOU, WE'VE BEEN GOING 45 MINUTES, I'M BRINGING THE HEARING  
7 TO A CLOSE VERY SOON.

8 MR. RAMSEY: SURE.

9 THE COURT: SO IF YOU WANT TO SAY SOMETHING ABOUT  
10 THAT ARBITRATION MOTION -- WE CAN'T GO OVER EVERYTHING ON THE  
11 WIRETAPPING. THERE'S JUST TOO MUCH. THAT'S WHY WE HAVE  
12 BRIEFS.

13 MR. RAMSEY: I UNDERSTAND. WE HAD ALSO MOVED TO  
14 DISMISS. I WILL SPEND ONE MORE MINUTE ON THIS AND THEN I'LL BE  
15 DONE.

16 THERE'S TWO THINGS THAT I THINK THEY FAILED TO ALLEGE WITH  
17 RESPECT TO WIRETAPPING. ONE IS WHAT SHE SAID ABOUT  
18 INTERCEPTION IN TRANSIT. I THINK IT'S EXACTLY LIKE THE  
19 MICROPHONE IN THE ROOM. THE WAY WEBSITES WORK IS YOU CANNOT  
20 RECORD ANYTHING UNTIL IT'S ALREADY COMMUNICATED TO THE WEBSITE.  
21 SO THAT'S LIKE THE MICROPHONE IN THE ROOM.

22 THE SECOND PIECE IS WHEN YOU HIRE A, A VENDOR LIKE THIS TO  
23 DO SOMETHING FOR YOU, THE CASES HOLD THAT THAT IS NOT  
24 WIRETAPPING. YOU'RE BASICALLY ONE AND THE SAME. BECAUSE IF I  
25 DID IT MYSELF, THERE WOULD NEVER BE ANY WIRETAPPING. IT'S ONLY

1 BECAUSE WE HAVE A VENDOR COME IN AND WE INSTALL THAT VENDOR'S  
2 SOFTWARE THAT THEY'RE ALLEGING WE HAVE WIRETAPPING, AND THE  
3 ONLY WAY THEY GET OUT OF THAT IS IF THEY CAN ALLEGE, UNDER  
4 RULE 11, THAT THE THIRD PARTY VENDOR THAT WE HIRED TO DO THIS  
5 TAKES THE DATA AND USES IT FOR ITS OWN PURPOSES.

6 THAT'S WHAT HAPPENS IN FACEBOOK. FACEBOOK GOES AROUND, IT  
7 DOESN'T JUST PROVIDE SOME SERVICE FOR ANOTHER WEBSITE. IT  
8 TAKES ALL THE INFORMATION FOR ITS OWN PURPOSES AND THEN SELLS  
9 IT.

10 NOTHING LIKE THAT HAPPENED HERE. THERE'S NO ALLEGATION  
11 ABOUT THAT. FRANKLY, THEY COULD NEVER MAKE THAT ALLEGATION,  
12 AND I THINK THEY KNOW THAT.

13 SO I'LL BE DONE.

14 THAT'S A REASON, TOO, TO DISMISS THE WIRETAPPING.

15 WITH RESPECT TO ARBITRATION, SO WE'RE BACK ON PAGE 1, AND  
16 WE HAVE THE WEB PAGE, I THINK IT'S AT 27-1, PAGE 2, AND YOU  
17 LAND ON THE PAGE. COUNSEL MENTIONED A FEW TIMES THAT IT'S BARE  
18 BONES AND A SIMPLE WEBSITE. I WOULD AGREE.

19 THERE ARE STATEMENTS ABOUT, YOU KNOW, THIS -- YOU KNOW,  
20 YOU MIGHT BE ABLE TO WIN A GIFT CARD, ET CETERA.

21 THEN THERE'S A GREY BOX THAT IS SEPARATE FROM THE ENTIRE  
22 REST OF THE WEBSITE WHERE YOU ENTER YOUR EMAIL ADDRESS, AND  
23 THEN RIGHT BELOW THAT THERE IS, "BY SIGNING UP, I AGREE TO THE  
24 PRIVACY POLICY AND THE TERMS AND CONDITIONS," WHICH ARE BLUE  
25 AND HYPERLINKED, AND THEN YOU CLICK THE BUTTON UNDERNEATH THEM.

1 THE COURT: WELL, BUT DOES THE -- DOES IT SAY  
2 ANYTHING ABOUT ARBITRATION THERE? IT SAYS TERMS AND  
3 CONDITIONS, BUT DOES IT SPECIFICALLY CALL OUT ARBITRATION?

4 MR. RAMSEY: THE NOTICE -- NO, THE NOTICE ON THE  
5 LANDING PAGE DOES NOT USE THE WORD "ARBITRATION." THE  
6 HYPERLINK TO THE TERMS AND CONDITIONS INCLUDE THE ARBITRATION.

7 THE COURT: WELL, IF YOU CLICK ON THE HYPERLINK,  
8 IT'LL TAKE YOU TO, WHAT, TERMS AND CONDITIONS?

9 MR. RAMSEY: CORRECT.

10 THE COURT: AND SOMEWHERE IN THE TERMS AND THE  
11 CONDITIONS, IS THE ARBITRATION REQUIRED?

12 MR. RAMSEY: CORRECT.

13 THE COURT: OKAY. HOW FAR INTO THE TERMS AND  
14 CONDITIONS DO YOU HAVE TO GO?

15 MR. RAMSEY: YOU JUST SCROLL DOWN A LITTLE BIT. I  
16 CAN GET THAT INFORMATION FOR YOU. IT'S NOT -- SORRY. IT'S NOT  
17 A LENGTHY TERMS AND CONDITIONS.

18 THE COURT: ALL RIGHT.

19 MR. RAMSEY: I MEAN, IT'S IN OUR BRIEFING. IT'S IN  
20 THE DECLARATION.

21 THE COURT: LET ME HEAR FROM THE OTHER SIDE.

22 WHY ISN'T THAT ENFORCEABLE?

23 MR. PELUSO: YOUR HONOR, AS WE SPELLED OUT IN THE  
24 BRIEFING, WE THINK THIS IS VERY SIMILAR TO THE NINTH CIRCUIT  
25 CASE OF BERMAN. THERE'S ALSO A CASE OF NGUYEN VERSUS

1        BARNES & NOBLE THAT WE CITE.

2                VERY SIMILAR SITUATIONS WHERE PEOPLE ARE JUST NOT PUT ON  
3        SUFFICIENT NOTICE.  THERE'S NO CLEAR MANIFESTATION OF ASSENT.  
4        YOU KNOW, YOU'VE GOT A GIANT FLASHING BANNER AND THEN ANOTHER  
5        GREEN, LARGE BUTTON, AND SOMEWHERE IN BETWEEN THERE, YOU KNOW,  
6        IF YOU GET YOUR MAGNIFYING GLASS OUT, MAYBE YOU CAN MAKE OUT  
7        EXACTLY WHAT IT SAYS.

8                BUT THE -- THE LANGUAGE IS JUST SO SMALL --

9                THE COURT:  WAIT.  IN THE VERY FIRST SCREEN, WITH THE  
10        HYPERLINK, DOES IT CALL OUT ARBITRATION?

11               MR. PELUSO:  NO, YOUR HONOR.  AND THAT'S --

12               THE COURT:  NOW, THAT -- THAT LEADS TO MY NEXT  
13        QUESTION.  THE LAST TIME I HAD ONE OF THESE ISSUES WAS A FEW  
14        MONTHS BACK, MAYBE A YEAR AGO, AND THERE IS SOME LAW IN THE  
15        NINTH CIRCUIT NOW, THE COURT OF APPEALS, THAT ADDRESSES THE  
16        EXTENT TO WHICH THE OPENING PAGE HAS TO CALL OUT ARBITRATION.

17               I'VE FORGOTTEN WHAT THE ANSWER TO THAT IS.  BUT DO YOU  
18        KNOW WHAT LAW I'M TALKING ABOUT?

19               MR. PELUSO:  I THINK YOUR HONOR MAY BE REFERRING TO  
20        THE BERMAN CASE.

21               THE COURT:  I DON'T KNOW.  WHAT DID IT HOLD?

22               MR. PELUSO:  TO THE EXTENT -- SO THE BERMAN CASE SORT  
23        OF PAINSTAKINGLY GOES THROUGH THIS EXACT SORT OF ISSUE ABOUT  
24        HOW OBVIOUS THE TERMS AND CONDITIONS NEED TO BE IN ORDER FOR IT  
25        TO BE A VALID MANIFESTATION OF ASSENT.

1           HERE THERE'S NO "I AGREE" BUTTON. THERE'S NOTHING THAT  
2           DRAWS THE VIEWER'S, THE WEBSITE VISITOR'S ATTENTION TO THE FACT  
3           THAT THERE'S ARBITRATION. EVEN THE BUTTON THAT YOU CLICK TO  
4           KEEP GOING DOESN'T SAY "I AGREE" OR SOMETHING IN THIS CASE. IT  
5           JUST SAYS "SEARCH FOR YOUR CASH."

6           THE COURT: WHAT DOES THE -- WHAT DOES THE BUTTON  
7           SAY?

8           MR. PELUSO: IT SAYS "SEARCH FOR YOUR CASH."

9           THE COURT: SEARCH FOR YOUR WHAT?

10          MR. PELUSO: CASH.

11          THE COURT: LIKE MONEY?

12          MR. PELUSO: LIKE MONEY, CASH.

13          YOU ENTER YOUR INFORMATION, THEN THERE'S VERY FINE PRINT  
14          WHICH, I GUESS, SAYS, YOU KNOW, THAT YOU'RE -- BY USING THIS  
15          WEBSITE, YOU'RE AGREEING TO THE TERMS OF USE, AND UNDER THAT IS  
16          A BIG GREEN BUTTON THAT SAYS "SEARCH FOR YOUR CASH."

17          AND THE DEFENDANT IS ARGUING THAT BY CLICKING "SEARCH FOR  
18          YOUR CASH," YOU ARE AGREEING TO ARBITRATE THIS CLAIM.

19          THE COURT: IF YOU DO GO TO THE HYPERLINK, HOW MANY  
20          PAGES OR SCREENS WORTH OF PRINT IS THERE?

21          MR. PELUSO: I DON'T WANT TO TALK OUT OF HAND, YOUR  
22          HONOR. I'M NOT SURE. I HAVEN'T PRINTED IT OUT.

23          THE COURT: ALL RIGHT. SO A DIFFERENT QUESTION THEN.  
24          WHERE -- IS IT TRUE THAT THERE'S A SEPARATE THING AT THE END  
25          WHERE YOU CONSENT TO THE TCPA?

1 MR. PELUSO: SO I -- I WANTED TO GET TO THAT POINT.

2 SO WE HAVE NO REASON TO DISPUTE THAT WHAT WHAT IF IS  
3 SAYING ON THAT POINT IS TRUE, THAT THE RECORDING DOES NOT START  
4 UNTIL YOU GET TO THE ACTUAL TCPA CONSENT LANGUAGE PAGE.

5 BUT BY THE VERY TERMS OF ITS OWN AGREEMENT, ITS OWN TERMS  
6 OF USE THAT IT'S TRYING TO SAY ARE APPLICABLE HERE, THE TERMS  
7 SAY, "WHERE YOU PROVIDE PRIOR EXPRESS CONSENT WITHIN THE  
8 MEANING OF THE TELEPHONE CONSUMER PROTECTION ACT, YOU  
9 UNDERSTAND AND AGREE THAT WE MAY USE A THIRD PARTY VENDOR TO  
10 RECORD AND STORE YOUR REGISTRATION AND CONSENT FOR COMPLIANCE  
11 PURPOSES."

12 SO BY THE VERY DEFINITION OF ITS OWN TERMS, THE TWO  
13 CONSENTS ARE LINKED, THE TCPA CONSENT THAT YOU'RE SUPPOSEDLY  
14 PROVIDING BY GOING TO THIS WEBSITE, AND ALSO THE SUPPOSED  
15 CONSENT TO BE RECORDED.

16 BUT YOU'RE NOT AGREEING TO BE BOUND BY THAT CONSENT  
17 PROVISION UNTIL YOU CLICK ALL THE WAY THROUGH, BY WHICH POINT  
18 THEY'VE ALREADY BEEN RECORDING, CAPTURING, INTERCEPTING YOUR  
19 INTERACTION ON THE WEBSITE.

20 SO IN THAT RESPECT, IT'S EXACTLY LIKE JAVIER WHERE THEY'RE  
21 TRYING TO GET RETROACTIVE CONSENT. THEIR OWN TERMS ONLY APPLY  
22 WHERE YOU PROVIDE PRIOR EXPRESS CONSENT UNDER THE TCPA. THAT  
23 IS WHAT TRIGGERS IT. THEY'VE ALREADY BEEN RECORDING SINCE YOU  
24 GET TO THAT VERY LANDING PAGE.

25 THE COURT: DO THEY RECORD -- HOW MANY PAGES ARE

1 THERE ALTOGETHER?

2 MR. PELUSO: I DON'T KNOW, YOUR HONOR. I DON'T HAVE  
3 IT PRINTED OUT AND I DON'T WANT TO --

4 THE COURT: WELL, IS IT, LIKE, A HUNDRED? LIKE,  
5 THREE? LIKE, A THOUSAND?

6 MR. PELUSO: I DON'T THINK IT'S --

7 MR. RAMSEY: IT'S LIKE THREE OR FOUR.

8 THE COURT: ALL RIGHT. SO ARE YOU SAYING THE  
9 RECORDING STARTS ON PAGE 1?

10 MR. PELUSO: THE RECORDING STARTS WHEN SOMEONE GETS  
11 TO THE TCPA LANDING PAGE, RIGHT? SO THEN YOU START ENTERING  
12 YOUR INFORMATION ON THAT PAGE.

13 YOU THEN CLICK, YOU KNOW, "SEARCH FOR YOUR CASH" OR  
14 WHATEVER AND OFF YOU GO.

15 THEY'RE SAYING THAT YOU CONSENT TO BE RECORDED BY CLICKING  
16 THE "SEARCH FOR YOUR CASH" BUTTON AND AGREEING TO THE TERMS OF  
17 USE.

18 BUT THEY'VE ALREADY BEEN RECORDING YOU ONCE YOU GET TO  
19 THAT PAGE. IT'S -- THE POINT IS THAT THEY LINK THE TWO TYPES  
20 OF CONSENT.

21 THE COURT: WELL, THE --

22 MR. PELUSO: SO THEY ONLY CONSENT TO BE RECORDED ON  
23 THE WEBSITE WHERE YOU AGREE TO BE CALLED FOR TCPA PURPOSES.

24 THE COURT: WAIT, WAIT. OKAY. LET'S JUST SAY THERE  
25 ARE FOUR PAGES.

1 MR. PELUSO: RIGHT.

2 THE COURT: AND -- BECAUSE I WANT TO UNDERSTAND YOUR  
3 POINT BECAUSE I'M GETTING TWO DIFFERENT MESSAGES HERE.

4 SO ON THE FIRST PAGE, THERE IS A BOX THAT YOU SAY HAS FINE  
5 PRINT THAT SAYS YOU AGREE -- "BY CLICKING BELOW, YOU AGREE TO  
6 BE BOUND BY OUR TERMS AND CONDITIONS," AND THERE'S ONLY A BOX  
7 THAT SAYS, WHAT, "SEARCH FOR MONEY," "SEARCH FOR CASH"?

8 MR. PELUSO: CORRECT.

9 THE COURT: ALL RIGHT. THIS IS ON PAGE 1. SO FAR AM  
10 I RIGHT? IS THAT WHAT YOU'RE TELLING ME?

11 MR. PELUSO: YES, YOUR HONOR. I THINK --

12 THE COURT: WELL, WAIT. WAIT. OKAY. IF THAT'S THE  
13 ANSWER, OKAY.

14 AND THEN IF YOU DID CLICK AND WENT THROUGH TO THE LINK,  
15 WHAT DOES IT SAY ABOUT TCPA IN THE TERMS AND CONDITIONS?

16 MR. PELUSO: SO IT'S ONE AND THE SAME. SO THE  
17 PRIVACY POLICY AND THE TERMS AND CONDITIONS THAT ARE LINKED IN  
18 THAT FINE PRINT BEFORE YOU SAY, YOU KNOW, "SEARCH FOR YOUR  
19 CASH," RIGHT, IF YOU WOULD CLICK ON THE PRIVACY POLICY, THAT  
20 PRIVACY POLICY SAYS, "WHERE YOU PROVIDE PRIOR EXPRESS CONSENT  
21 WITHIN THE MEANING OF THE TELEPHONE CONSUMER PROTECTION ACT,  
22 YOU UNDERSTAND AND AGREE THAT WE MAY USE A THIRD PARTY VENDOR  
23 TO RECORD AND STORE YOUR REGISTRATION AND CONSENT FOR  
24 COMPLIANCE PURPOSES."

25 SO MY POINT IS SIMPLY THAT THE TCPA CONSENT AND THE



1 CONSENT TO BE RECORDED ARE LINKED.

2 THE COURT: BUT ON THAT FIRST PAGE, IS THE COMPANY --  
3 IS ANYBODY RECORDING YOUR MOUSE MOVEMENTS ON PAGE 1?

4 MR. PELUSO: WE ALLEGE -- AND I DON'T THINK THE  
5 DEFENDANTS DISPUTE -- THAT THE KEYSTROKES AND THE MOUSE  
6 MOVEMENTS ARE BEING TRACKED ON THE TCPA CONSENT PAGE. IT'S  
7 REALLY THE SAME PAGE THAT'S TRIGGERING BOTH THINGS, WHETHER  
8 IT'S PAGE 1 OR PAGE 4. I DON'T THINK IT'S REALLY IN ANY  
9 DISPUTE THAT THE -- THAT THE PAGE THAT'S AT ISSUE HERE IS THE  
10 PAGE THAT HAS THE INFORMATION YOU TYPE IN, THEN THE FINE PRINT  
11 WITH THE HYPERLINKS TO THE PRIVACY POLICY AND THE TERMS, AND  
12 THEN THE GREEN BUTTON THAT SAYS "SEARCH FOR YOUR CASH."

13 SO WHETHER THERE ARE PAGES BEFORE THAT, I DON'T KNOW AND  
14 IT'S NOT REALLY AT ISSUE IN THIS CASE.

15 THE RECORDING HAPPENS ON THAT PAGE WHERE THERE'S THE TERMS  
16 OF USE AND THE PRIVACY POLICY.

17 IN THAT PRIVACY POLICY, THEY CLAIM THAT THEY HAVE CONSENT  
18 TO DO THE RECORDING.

19 BUT THE -- THE CONSENT IS LINKED TO THE TCPA CONSENT. SO  
20 YOU WOULD HAVE TO GO ALL THE WAY THROUGH AND AGREE TO BE CALLED  
21 FOR TCPA PURPOSES BEFORE THEIR CONSENT TO BE RECORDED IS  
22 TRIGGERED BY THE VERY TERMS OF THEIR OWN AGREEMENT.

23 THE COURT: ALL RIGHT.

24 MR. PELUSO: AND BY THAT POINT THEY'VE ALREADY BEEN  
25 RECORDING.

1 THE COURT: ON THE LAST PAGE WHERE THERE'S -- WHAT  
2 DOES IT SAY ON THE SCREEN ABOUT CONSENT?

3 MR. PELUSO: SO I DON'T THINK IT SAYS ANYTHING ON THE  
4 SCREEN ABOUT CONSENT. I THINK YOU WOULD HAVE TO CLICK ON  
5 EITHER THE TERMS OF USE OR THE PRIVACY POLICY LINK IN ORDER TO  
6 READ ANYTHING ABOUT THE CONSENT THAT THEY'RE TRYING TO ENFORCE.

7 THE COURT: WELL, WHAT -- I THOUGHT COUNSEL TOLD  
8 ME -- I'LL COME BACK TO COUNSEL, BUT I THOUGHT HE TOLD ME THAT  
9 THE REASON THAT JAVIER WAS DIFFERENT WAS THAT THE RECORDING  
10 DIDN'T EVEN START UNTIL THE LAST PAGE, AND THAT ON THE LAST  
11 PAGE, THAT'S WHERE THE CONSENT WAS.

12 AND I -- THAT'S WHAT I THOUGHT HE WAS SAYING.

13 MR. PELUSO: AND I'M NOT REFUTING THAT.

14 ALL I'M SAYING IS EVEN IF YOU WERE TO FIND THAT SOMEHOW  
15 GOING TO THIS WEBSITE, THE WAY THE WEBSITE IS LAID OUT IS  
16 SUFFICIENT TO MANIFEST ASSENT TO THE TERMS OF USE AND THE  
17 PRIVACY POLICY -- WE DON'T THINK THAT THAT'S TRUE, BUT EVEN IF  
18 YOU DO THAT, THE VERY TERMS OF THE PRIVACY POLICY LINK THE  
19 CONSENT TO BE RECORDED ON THE WEBSITE WITH THE TCPA CONSENT.

20 SO BY THEIR OWN WORDS, YOU CAN'T PROVIDE CONSENT TO BE  
21 RECORDED UNTIL YOU'VE ALREADY PROVIDED THE TCPA CONSENT.

22 SO THEY'VE -- THEY'RE RECORDING YOU BEFORE YOU GET TO THE  
23 POINT WHERE YOU GET ALL THE WAY TO THE TCPA PAGE AND CLICK  
24 "AGREE" OR, YOU KNOW, WHATEVER, CLICK THE BUTTON AND MOVE ON.

25 THE COURT: ALL RIGHT.

1 IS THAT TRUE?

2 MR. RAMSEY: OKAY. SO PAGE 1 IS "I AGREE TO THE  
3 TERMS AND CONDITIONS AND PRIVACY POLICY."

4 THE COURT: YEAH.

5 MR. RAMSEY: IN THE PRIVACY POLICY IS WHERE THE  
6 CONSENT LANGUAGE IS, AND OTHER LANGUAGE. I'LL COME BACK TO  
7 THAT.

8 THE COURT: CONSENT TO WHAT THOUGH?

9 MR. RAMSEY: CONSENT TO RECORDING. I'LL COME BACK TO  
10 THE SPECIFIC LANGUAGE.

11 THEN THERE'S PAGE 2, PAGE 3, PAGE 4 IS THE TCPA PAGE.  
12 THAT'S THE ONLY PAGE WHERE THEY ALLEGE RECORDING HAPPENS, AFTER  
13 WE SAY YOU'VE GIVEN CONSENT, AND THAT'S WHERE THE RECORDING  
14 HAPPENS.

15 THE COURT: BUT ON PAGE 1, 2, AND 3, THERE'S NO  
16 RECORDING?

17 MR. RAMSEY: CORRECT.

18 THE COURT: BUT IF YOU GET TO PAGE 4, IS IT RECORDED  
19 BEFORE THEY CLICK ON CONSENT? OR AT THE MOMENT THEY CLICK ON  
20 CONSENT IT STARTS -- IT CAPTURES WHAT'S ON THAT PAGE?

21 MR. RAMSEY: IT CAPTURES ONCE YOU LAND ON PAGE 4.

22 BUT WE'VE GOTTEN CONSENT ON SCREEN 1 TO RECORD YOU, AND  
23 THIS IS WHERE HE GETS IT. IN THE PRIVACY POLICY, IT SAYS,  
24 "WHERE YOU PROVIDE PRIOR EXPRESS CONSENT IN THE TCPA, YOU  
25 UNDERSTAND AND AGREE THAT WE MAY USE A THIRD PARTY VENDOR TO

1 RECORD AND STORE YOUR REGISTRATION AND CONSENT FOR COMPLIANCE  
2 PURPOSES."

3 HE'S READING THAT TO SAY ONLY IF YOU PROVIDE CONSENT MAY  
4 WE RECORD YOU, AS OPPOSED TO WHERE, MEANING THE PAGE WHERE YOU  
5 DO THIS, WE'RE RECORDING IT.

6 THERE ARE ALSO SEVERAL OTHER PROVISIONS IN THE PRIVACY  
7 POLICY THAT DESCRIBE WHAT'S GOING ON AND TALK ABOUT THE  
8 WEBSITE'S ABILITY TO USE VENDORS TO COLLECT INFORMATION, ET  
9 CETERA.

10 AND IN THIS PARTICULAR CASE, IN MY VIEW, THE WAY THAT  
11 PROVISION READS, IT MEANS I GET TO RECORD YOU ON THE PAGE WHERE  
12 YOU WOULD PROVIDE YOUR CONSENT. THAT'S EVIDENT, I THINK, FROM  
13 THE LANGUAGE.

14 IT IS ALSO EVIDENT FROM THE VERY FACT THAT YOU'RE GIVING  
15 CONSENT TO RECORD YOUR -- I MEAN, YOU'RE RECORDING IT. IT'S  
16 HAPPENING WHILE IT HAPPENS.

17 THE COURT: ALL RIGHT.

18 ON THE SUBSTANCE OF THE ARBITRATION PROVISION, IS THERE  
19 ANYTHING THAT YOU THINK IS UNFAIR, LIKE, FOR EXAMPLE, THE  
20 CONSUMER HAS TO PAY FEES OF THE ARBITRATOR? OR IS THERE  
21 ANYTHING LIKE THAT?

22 MR. PELUSO: WE'RE NOT MAKING ANY UNCONSCIONABILITY  
23 ARGUMENTS, YOUR HONOR. OUR POINT IS SIMPLY THAT THERE'S NOT  
24 ENOUGH HERE TO FORM A VALID CONTRACT.

25 THE COURT: ALL RIGHT.

1 MR. PELUSO: THERE'S JUST NOTHING THERE.

2 THE COURT: ALL RIGHT.

3 MR. PELUSO: SO FOR THE SAME REASON -- JUST VERY  
4 BRIEFLY, FOR THE SAME REASON THAT WE BELIEVE THE ARBITRATION  
5 AGREEMENT FAILS IS THE EXACT SAME REASON THAT WE BELIEVE THE  
6 CONSENT ARGUMENT FAILS. THEY FAIL IN THE SAME WAY. THEY'RE  
7 CONTAINED IN THE SAME TERMS.

8 SO TO THE EXTENT YOUR HONOR FINDS THAT THERE'S NO  
9 AGREEMENT TO ARBITRATE, THIS CONSENT ARGUMENT WOULD ALSO --

10 THE COURT: LET'S SAY -- I DON'T KNOW IF THIS IS TRUE  
11 BECAUSE I HAVEN'T LOOKED AT THIS FORM YET, THIS PAGE YET -- BUT  
12 LET'S SAY THERE WAS A FLASHING BOX THAT HAD DOLLAR SIGNS ON IT  
13 AND IT SAID, "GET YOUR CASH NOW." AND THEN IT SAYS IN TINY  
14 PRINT, IT SAID, "BUT IF YOU DO, YOU ARE AGREEING TO ALL THESE  
15 THINGS." SO YOU'RE SAYING THAT THAT'S TOO UNFAIR, THAT'S NOT  
16 ENOUGH NOTICE?

17 MR. PELUSO: CORRECT. AND I WOULD SAY THAT IT'S EVEN  
18 WORSE THAN THE SCENARIO YOUR HONOR JUST DESCRIBED BECAUSE  
19 THERE'S NOTHING THAT ACTUALLY -- NOTHING IN THE SMALL TEXT THAT  
20 WOULD PROVIDE SOMEONE NOTICE THAT, "HEY, THERE'S AN ARBITRATION  
21 AGREEMENT IN HERE, YOU BETTER READ IT BEFORE YOU GO ON."

22 THE COURT: OKAY.

23 MR. PELUSO: A LOT OF WEBSITES THAT YOU GO TO,  
24 THERE'S CHECK BOXES WHERE YOU HAVE TO AFFIRMATIVELY SAY, "I  
25 AGREE TO THIS." SOME WEBSITES REQUIRE YOU TO ACTUALLY OPEN UP

1 THE TERMS OF USE BEFORE YOU CAN PROCEED.

2 NONE OF THAT IS THIS CASE. THIS CASE IS THERE'S, THERE'S  
3 TINY PRINT SAYING THAT, YOU KNOW, "BY USING THIS WEBSITE, YOU  
4 AGREE TO THE TERMS OF USE AND THE PRIVACY POLICY." YOU DON'T  
5 HAVE TO CLICK THE LINKS TO PROCEED. THERE'S NO CHECK BOX. THE  
6 BUTTON DOESN'T EVEN SAY "I AGREE." THE BUTTON SAYS "SEARCH FOR  
7 YOUR CASH."

8 AND SOMEHOW THAT MEANS I AGREE TO ARBITRATE THIS CASE.

9 THE COURT: OKAY MY FRIENDS. I'M GOING TO BRING YOU  
10 TO A CLOSE, BUT I'LL LET EACH OF YOU SAY ONE MINUTE MORE IF  
11 THERE'S ANYTHING YOU'RE DYING TO SAY.

12 LET'S HEAR FROM WHAT IF.

13 MR. RAMSEY: JUST BRIEFLY ON THE ARBITRATION PAGE.

14 THE LAW I THINK THAT YOUR HONOR IS CITING IS FROM THE  
15 NGUYEN AND BERMAN CASES.

16 THE COURT: OKAY.

17 MR. RAMSEY: I WAS THE LOSING ATTORNEY IN THE BERMAN  
18 CASE. I CAN TELL YOU, SITTING HERE --

19 THE COURT: SO YOU'RE AN EXPERT.

20 MR. RAMSEY: -- THAT THIS CASE IS VERY DIFFERENT FROM  
21 THE CASES THAT THE BERMAN COURT ADDRESSED. THE HYPERLINKS ARE  
22 BLUE, UNLIKE THE BERMAN CASE.

23 THERE'S ALSO LANGUAGE THAT SAYS, "BY SIGNING UP, YOU AGREE  
24 TO," WHICH WAS ABSENT FROM THE BERMAN CASE.

25 AND THE WEBSITE HERE IS MUCH SIMPLER OVERALL. THERE'S A

1 HANDFUL OF LINES OF TEXT, THEN THERE'S A BOX WHICH IS WHERE YOU  
2 ARE TO ENTER INFORMATION, AND WITHIN THAT BOX IS WHERE THE KEY  
3 LANGUAGE IS PROVIDING NOTICE.

4 THE COURT: OKAY.

5 YOUR TURN. YOU GET ONE LAST WORD.

6 MR. PELUSO: OKAY, YOUR HONOR.

7 I DON'T WANT TO GO OVER OLD GROUND, BUT I WOULD SIMPLY SAY  
8 THAT WE DON'T BELIEVE THAT THE LAYOUT OF THIS WEBSITE, UNDER  
9 NINTH CIRCUIT PRECEDENT, IS ENOUGH TO MANIFEST ASSENT TO AGREE  
10 TO ARBITRATE THIS CASE. FOR THAT SAME REASON, IT -- THE TERMS  
11 OF USE ARE NOT APPLICABLE FOR CONSENT PURPOSES.

12 TO THE EXTENT YOUR HONOR IS CONCERNED THAT WE DIDN'T USE  
13 MAGIC LANGUAGE RELATED TO THE WORD "INTERCEPT," THAT CAN BE  
14 EASILY CURED WITH AN AMENDMENT.

15 THE COURT: OKAY. WE'VE BEEN GOING A LITTLE BIT MORE  
16 THAN AN HOUR. I'M GOING TO BRING IT TO A CLOSE.

17 THANK YOU, COUNSEL. IT'S UNDER SUBMISSION.

18 MR. RAMSEY: THANK YOU, YOUR HONOR.

19 MR. PELUSO: THANK YOU, YOUR HONOR.

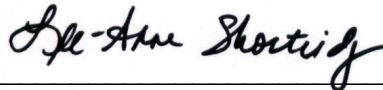
20 THE COURT: ALL RIGHT.

21 (THE PROCEEDINGS WERE CONCLUDED AT 12:04 P.M.)  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

DATED: MAY 8, 2023